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Gender and Sexual Orientation Discrimination in Canada.

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Discrimination against and upon individuals from all walks of life, has always been an issue and concern for many Canadians. It varies within society, but most Canadians like to think of themselves as socially conscious and open to the equal treatment of all our citizens. Issues of discrimination have occupied human resource departments of major corporations, government departments and unions for many years. *The Canadian Human Rights Commission* and similar provincial bodies are now universally mandated to deal with all forms of discrimination, on the basis of certain protected characteristics in the workplace, where they may not exist or where only limited protection is offered. The labour codes of all provinces have sections relating to these issues and likewise, if they are absent or insufficient, then the *Canadian Labour Code* and the associated *Human Rights Code* prevails.

The subject of human rights and discrimination is very broad, as such this essay will only be looking into key issues surrounding *gender* and *sexual orientation discrimination.* The essay will examine two of the landmark cases that have set precedent in these areas within Canada. There have been many cases, but these two being examined have been instrumental in providing protection from discrimination on the basis of gender equality and sexual orientation.

My argument will show, that in spite of all the provisions of the court and societal awareness, protection from gender and sexual orientation discrimination has not always been as complete, and all encompassing as it could, or should have been. Without a doubt, some rulings from the Courts have fallen short of the expectations of the petitioners. Protected characteristics have had different meaning and significance across Canada. The issues have evolved and continue to do

so. In many cases, changes in the law have been necessitated by decisions or outcomes of particular challenges in civil court, up to and including the *Supreme Court of Canada* (SCC).

The two cases being examined in this paper are from the landmark 'trilogy' of *Equality Rights* cases published by a very divided Court in May 1995. Each of these were *Section 15 (s. 15), Equality Rights*, from *The Canadian Charter of Rights and Freedoms*[1] (Charter) cases. They dealt with different but slightly connected issues of equality and gender. One had to do with sexual orientation and *Old Age Security Act* (OAS); [2] the other with marital status and spousal automobile accident insurance benefits.[3] The third case of the 'trilogy', not included in this examination, was landmark in its own right, but not applicable to this essay topic. It dealt with issues of child support payments and the *Income Tax Act.*[4]

These cases were landmark, but as is often the case, not entirely favourable for all petitioners. Both of the outcomes from the two case studies, were very instructive as to the analogous discrimination grounds resulting, that were subsequently entrenched into s. 15. Also important was their effect on further legislation that followed. The coming into effect of s. 15 in 1985, has had a marked influence in the reform of equality rights, never seen before. Since the early 1990s, there has been a gradual development of s. 15 jurisprudence entirely case dependent. Subsequent legislation on all levels to extend the entitlements of

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1 Fox & White, (1987) Politics Canada: Sixth Edition, McGraw – Hill Ryerson. **Constitution Act, 1982, pp.92-150**.
2 Egan v Canada, [1995], 2 S.C.R. 513. .
3 Miron v Trudel, [1995], 2 S.C.R. 418
4 Thibaudeau v Canada, [1995], 2 S.C.R. 627

heterosexual couples to same-sex couples has evolved. Since *Egan,* (1995) (one of our case studies) many provinces have introduced legislation to amend the definition of 'spouse' to include persons of the same sex. Other like amendments have seen replacing 'surviving spouse' with the gender neutral wording of 'survivor'.

Before proceeding to the case studies, a closer look at the Charter particularly *Section 1, The Guarantee of Rights and Freedoms, and Section 15, Equality Rights* , [5] is required, to provide some context for the cases and the process upon which the SCC heard them.

The Charter, was entrenched into the *Constitution Act* in 1982. Section 15 was held back for three years until 1985, to give other levels of government the opportunity to amend their laws in keeping with the intent of that section. The Charter, now being within the Constitution, ensures that the rights and freedoms for all Canadians are upheld in law, as being necessary for living in a free and democratic society.[6]

Section 15 (1) , Equality Rights,[7] of the Charter states: *"Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."* (s. 15). *Subsection s. 15(2)*, essentially details the same protected characteristics, but more refers to Affirmative Action issues, not being covered by

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5 Fox & White, (1987) Politics Canada: Sixth Edition, McGraw – Hill Ryerson. **Constitution Act, 1982, pp.92-150**. (Underlines mine)

6 Ibid., pp. 92-150.

7 Ibid., p.95, (underlines mine).

this paper. There are four pillars of equality in s. 15, that form the basis of strength for this section of the Charter. They are, to paraphrase: equal before the law, equal under the law, equal protection of the law and equal benefit of the law. Any equality right challenge must first find its violation in one or more of these four pillars, before it would be subject to any possible limitation imposed by Section 1 of the Charter.

Section 1, Guarantee of Rights and Freedoms,[8] of the Charter states: " *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".* (s. 1). This section is used as a 'reasonable limits clause' on almost all Charter cases. The explanation that follows is how the Supreme Court of Canada (SCC) has interpreted the wording of s. 1, and how it is applied to cases.

The process employed, was a two-part legal test known as the *Oakes test*. This test found its way into Canadian jurisprudence through the case of *R v Oakes, (1986)*[9]. Mr. Oakes was charged in 1981 with possession, with intent to traffic. At that time, any person charged with drug possession was automatically charged with intent to traffic. *The Narcotic Control Act, (NCA) s. 8*, also placed a reverse onus on the person charged to prove 'beyond a reasonable doubt', there was no intent to traffic. *Oakes* challenged this as an infringement of his s. 11(d)[10] right to be presumed innocent until proven guilty. The case ultimately made it to the SCC, and

[8] Fox & White, (1987) Politics Canada: Sixth Edition, McGraw – Hill Ryerson, p. 92, (underlines mine).
[9] R v Oakes, [1986], 1 S.C.R. 103
[10] Fox & White, (1987), p. 94

the court decision in 1986 found that s. 8 of the NCA did in fact violate s. 11(d) of the Charter.

The two part *Oakes* test was written by *Chief Justice Brian Dickson*,[11] and essentially states in Part (1), there must be a pressing and substantive objective for the law or government action to prevail over s. 15. In Part (2), the means chosen to achieve the objective must pass a three part proportional analysis by which; (a) It is rationally connected, is not arbitrary or unfair; (b) involves minimal impairment to the Charter, within a range of reasonable alternatives; (c) has a proportionate effect, that strikes a balance between the negative effects of the law and the beneficial purpose. Failing any one of these tests, the challenge would be upheld. In *R v Oakes*, the government failed to meet the provision of s. 1 by the minimal impairment test, (b) as the reverse onus placed *Oakes'* s. 11(d) rights as being completely impaired and thus, s. 8 (NCA) was deemed no force or effect.[12] As mentioned, generally all Charter cases are now tested as to their possible reasonable limit by s. 1, using the *Oakes* test, among other jurisprudence and matters that may be relevant.

Returning to the two landmark equality cases referenced earlier, the first case dealt with sexual orientation, *Egan v. Canada*.[13] It began in 1986, when James Egan reached age 65 and applied for *Old Age Security Act*, (OAS) and the guaranteed income supplement (GIS), which he subsequently received. In 1989, his ' life' partner since 1948, John Nesbit upon reaching age 60, applied for a spousal

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11 R v Oakes, [1986], 1 S.C.R. 103 , (Underlines mine)
12 Ontario Justice Education Network, (2013) (ojen.ca) Section 1 of The Charter and the Oakes Test, In Brief, pp. 1-7.
13 Egan v Canada, [1995] 2 S.C.R. 513

allowance. This allowance was available and granted to those between age 60 and 65, whose spouses were receiving OAS and GIS. The spousal allowance application was subsequently denied, as Nesbit did not meet the definition of 'spouse' contained in section 2 of the OAS Act[14], which stated in part, "*a person of the opposite sex who is living with that person, having lived with that person for at least one year, if the two persons have publicly represented themselves as husband and wife".* It made no provision for a 'same-sex spouse', only 'spouse' and 'non-spouse'. The wording here was to disallow the inclusion of siblings or others as a 'spouse' The case went through Federal court of British Columbia (BC), in 1992. *Egan and Nesbit* alleged that their right to equal protection and equal benefit of the law in s. 15 was infringed and discriminatory on the basis of their sexual orientation. The petition included a remedy, to include in the definition of 'spouse' in s. 2 (OAS Act) 'same-sex couples'. In the *Federal Court of BC*. their application was dismissed. The trial judge asserted that the distinction between spouses and non-spouses had nothing to do with sexual orientation.

The decision was appealed to the *Federal Court of Appeal*. In 1993 by a 2-1 vote, the judgment of the Trial judge was upheld. The two concurring judgments offered little more than what the Trial Judge had found. However the one dissenting opinion concluded that the definition of spouse in the OAS Act made a clear distinction between heterosexuals and homosexuals, and was therefore discriminatory on the basis of sexual orientation. He further noted that the

[14] s. 2, OAS Act.

exclusion of same-sex couples did not just minimally impair Egan and Nesbit's s. 15 rights, but in fact was very onerous.[15]

In 1994, the case made its way to the SCC and in a contentious 5-4 vote they dismissed the appeal and upheld the constitutionality of the definition of 'spouse' in the OAS Act. While Four justices wrote in the majority, and four wrote dissenting opinions, the fifth justice concurred with the majority, but disagreed with them that s. 2 of the OAS Act was not discriminatory. The significance of *Egan v Canada* as a precedent, was that sexual orientation would now and forever be seen as an analogous ground under s. 15 and thus a prohibited ground of discrimination.

Writing for the majority, *Justice Gerard La Forest* stated: [16] *"I have no difficulty accepting the appellants' contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds."* This excerpt from *La Forest* has been cited and quoted extensively in numerous cases involving sexual orientation. Though losing the original intent of s. 15 challenge, *Egan v Canada* was still considered landmark and a major breakthrough for the *Lesbian, Gay, Bisexual and Transgender* (LGBT) community for the future, because it led to further expansion of sexual orientation rights.

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15 Egan v Canada, [1995] 2 S.C.R. 513, p. 528.
16 Ibid., p. 528.

The second case to look at is *Miron v Trudel.*[17] This was an automobile insurance case involving the denial of accident benefits to a common law spouse. This raised the issue of marital status. In 1987, John Miron (M) was injured as a passenger in an uninsured vehicle, (owned by William James McIsaac, driven by an uninsured driver, (Richard Trudel). Miron could nor longer work. He therefore made a claim for accident benefits for loss of income against his common law partner, Jocelyne Valliere's (V) automobile insurance policy. He also claimed damages for uninsured motorist coverage, all of which were provided by the insurance policy as extended benefits to the 'spouse' of the policy holder (V). The respondent insurer, *Economic Mutual Insurance Company* denied the claim on the grounds that M was not legally married to V and thus not her 'spouse' in terms of the policy. The terms of the policy set out by the *Ontario Insurance Act*, [18] provided that 'spouse' meant a person who is legally married. There was no provision for a common law relationship in the act.

The appellants, (M & V) sued the insurer. A preliminary motion by the insurer was brought forth to determine if the word 'spouse' in the policy included 'unmarried common law spouses'. The motions court judge also found for the insurance company, that 'spouse' meant a person who was legally married. The case was then taken before the Court of Appeal on the basis that M was a 'spouse' under the terms of the policy; also that the policy governed by the terms of a *Standard Automobile Policy, by the Insurance Act, R.S.O. 1980, c. 218* discriminated against him by s. 15 of the Charter. The Court of Appeal dismissed their appeal also.

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[17] Miron v Trudel, [1995], 2 S.C.R. 418.

[18] Ontario Insurance Act, ss. 231,233, Schedule C and R.R.O. 1980, Reg.535.

The case was finally heard in 1994 by the SCC. In a very lengthy and divided opinion, the decision of the Court of Appeal was overturned and the appeal was allowed by a 5-4 decision. The case was landmark by virtue that 'marital status' was now analogous with other grounds of discrimination in s. 15 of the Charter. Further, the Ontario Insurance Act was instructed to retroactively include unmarried partners in the definition of 'spouse'.

Miron v Trudel was eventually successful for the petitioners. Beyond the settlement, '*Marital Status*' was now a protected characteristic in the federal and each provincial Human Rights code. In *Egan v Canada*, the success was bitter sweet for the petitioners. They lost their specific appeal for spousal OAS benefits through a fractured Court decision. However, as mentioned earlier, *'Sexual Orientation'* was now an analogous right under s. 15.

The *Egan v Canada* case was arguably one of the most significant cases for equality rights and sexual orientation in Canada. As eluded to previously, it has been the basis for virtually all the progress for LGBT rights in Canada. For example, in September, 2003, *Bill C-250*[19] was passed as a bill to amend the Criminal Code of Canada (CCC) regarding hate crime. It's purpose was to include in subsection 318(4) of the CCC, 'sexual orientation' as an 'identifiable group' requiring protection from hate crime. It was very contentious, but finally received Royal Assent in 2004.[20] *Section 318(4)of CCC*[21] now states: "*In this section, identifiable group means any*

[19] 37th Parliament, 2nd Session, September 17, 2003.
[20] 37th Parliament, 3rd Session, April 29, 2004.
[21] Criminal Code of Canada, Section 318(4)

section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability."

A recent and further landmark effect of *Egan*, was *Bill C-38*[22] introduced in 2005 to provide for same-sex marriage. Also very contentious in Parliament and in public and far from unanimous, it did however receive Royal Assent on July 20th , 2005.[23] This became the *Civil Marriage Act*.[24] The long title being, "*An act respecting certain aspects of legal capacity for marriage for civil purposes"'*[25] A further quote from the Act, the legislative summary, captures the very essence of what *Egan v Canada* eventually encompassed: *" This enactment extends the legal capacity for marriage for civil purposes to same-sex couples in order to reflect values of tolerance, respect and equality, consistent with the Canadian Charter of Rights and Freedoms. It also makes consequential amendments to other Acts to ensure equal access for same-sex couples to the civil effects of marriage and divorce"* [26]

There have been other cases, that have dealt with similar aspects of these issues. These two cases in my view have had the most impact on Canadian jurisprudence, in the area of gender and sexual orientation by the analogous nature of inclusion in s. 15, and the progressive legislation that has followed.

One would think that with all the above mentioned policies and processes, that gender issues in Canada would be safe from incursion. Apparently not. A recent article in 2015 by *Rebecca Tiessen and Krystel Carrier*, showed that the Harper

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[22] 38th Parliament, 1st Session, February 1, 2005.
[23] 38th Parliament, 1st Session, July 20, 2005.
[24] Civil Marriage Act, Statute of Canada, S.C. [2005], c. 33.
[25] Ibid.,
[26] Civil Marriage Act, Statute of Canada, S.C. [2005 (Underline mine)

Government from about 2007 to 2009, systematically and quite subtly, began to change wording in Canadian foreign policy reports and other data, from *'gender equality'* to '*equality between women and men'* .[27]

Though not an equal rights issue per se, it nevertheless shows how subtle events in politics as simple as policy word changes can challenge the efforts being made by others to make society equitable for all. No doubt, if an issue were to arise domestically in Canada in relation to those foreign policy word changes, a Charter challenge on equality rights would likely ensue. One cannot have one set of wording for foreign policy documents and a different set for domestic affairs.

On the surface these two sets of terms may seem to mean the same thing. However, upon closer examination, that is only partly true.[28] '*Equality between women and men'* as newly defined by the *Department of Foreign Affairs and International Trade* (DFAIT) is now: *"promoting the equal participation of women and men in making decisions; supporting women and girls so they can fully exercise their rights; and reduce the gap between women's and men's access…".* By contrast, '*gender equality*' , (since removed) was defined in *Canadian International Development Agency* (CIDA) as: …"*women and men enjoy the same status and have equal opportunity to realize their full human rights and potential to contribute to national, political, economic, social and cultural development, and to benefit from the results…. Gender equality is the equal valuing by society of both the similarities and differences between women and men…."* [29]

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[27] Tiessen & Carrier, (2015), Harper Conservatives shift from 'gender equality', pp. 95-111.
[28] Ibid., p. 96
[29] Ibid., p. 96. (underline is mine)

The new term similar to the old term, recognizes that men and women should have the same rights and access to the same resources (going in). *'Gender equality'* however, makes the distinction that giving men and women the same opportunities may not always produce the same results, and in many situations does not. *'Gender equality'* does ensure equality in treatment, but key is that it additionally provides for equality of outcomes.

It's not entirely clear exactly when these changes in language started to appear, but clearly by 2009, this was the language of DFAIT, as well as CIDA, (currently merged with DFAIT). An important side note here, is that the term '*gender equality'* makes the provision for all gender issues. The new foreign policy language changes, though not directly related, were surprisingly and coincidentally (though perhaps not), connected with some domestic funding cuts. From 2006 to 2010, funding to women's advocacy groups was cut by 43%. The Status of Women Canada's budget was cut by 38% and 12 of 16 regional offices closed. '*Gender equality'* was removed from their mandate.[30]

These issues of gender are brought up here, as a point of concern, that in spite of good policy and provisions in the law, wording changes can have devastating consequences for local and domestic program initiatives trying to move forward. How the 'new' Trudeau government approaches these issues remains to be seen.

Finally, worth noting is that the SCC has certainly had it's difficulties in being consistent with interpretation and approach with evaluating s. 15 Charter

[30] Tiessen & Carrier (2015), p.97.

challenges in the past. In many earlier judgements the Court was severely fractured on many of these implementations. In 1999 however, with the unanimous ruling in *Law v Canada,* [31] denying the s. 15 claim, it became apparent that the Court was attempting to heal its past splits. The court made a conscious effort to reconcile and set benchmarks for the future years.[32] *Law* was a s. 15 claim against age-based discrimination, [33] '*because Canada Pension Plan survivor benefits are denied to able-bodied surviving spouses under the age of 35 who are without dependent children'*. The appeal was dismissed, but the outcome was consolidated and principles refined with a view to instruct and guide lower courts, for future evaluation of discrimination claims under the Charter. In summary, the Court restated and expanded the evaluation of discrimination under s. 15, that determination should be whether:[34]

- the law in question actually distinguishes between the claimant and others on various grounds or results in substantively different treatment, and thus fails to take into account the claimant's disadvantaged position.
- that the differential treatment is based on one or more enumerated or analogous grounds of s. 15

[31] Law v Canada (Minister of Employment and Immigration),[1999], 1 S.C.R. 497.
[32] Library of Parliament, (2007) Background Paper, BP-402E, Charter Equality Rights: Interpretation of Section 15 in SCC Decisions.
[33] Ibid., p. 6
[34] Ibid., p. 6

- the treatment discriminates substantively by imposing a burden or withholding a benefit, or that otherwise has a demeaning or devaluing effect on the individual.

A partial quote from the background paper: [35] "*The purpose of s. 15, is to prevent the violation of human dignity and freedom…and to promote equal recognition at law of all persons as equally deserving."* Another partial: "*Within these principles, the Court found in [Law v Canada], that even though the provisions of the Canada Pension Plan do create differential treatment based on age, they do not impose a substantive long term disadvantage… and do not violate human dignity for surviving spouses under the age of 35. They are therefore not discriminatory."*

Conclusion

The Charter has certainly had its critics. Some suggest that having Charter decisions rendered by the SCC usurps parliament and the political process. That has some argument, given the difficulty and faction that the Court has had to deal with. But in the overall process, history would show that it would be very difficult for certain governments, (political parties) to be able to secure certain controversial minority rights. Sexual orientation and same – sex marriage come to mind. These types of issues do not flow easily through our parliamentary system. There are no doubt many other examples. It spite of the difficulties with certain cases, and critics, the SCC and the Charter have worked as intended.

[35] Library of Parliament, (2007) Background Paper, BP-402E p. 7-8, (underline mine)

There will always be difficult cases to be adjudicated. These issues should never be left to politicians to solve. As case law has further developed, the Court has evolved (and continues to do so) and the jurisprudence as such is becoming evermore equitable with time.

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